

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO**

RAFAEL E. CINTRON-GARCIA, et al.,

## Plaintiffs,

V.

**SUPERMERCADOS ECONO, INC., et al.,**

## Defendants.

Civil No. 10-2023 (GAG)

## **OPINION AND ORDER**

Plaintiffs Rafael E. Cintron-Garcia (“Plaintiff”) and his wife, Norma I. Ortiz-Colon<sup>1</sup>, filed a complaint against Supermercados Econo, Inc. (“Econo” or “Defendant”) alleging disability discrimination, retaliation and wrongful termination. The action is brought pursuant to Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. §§ 2000e *et seq.*; and the Americans with Disabilities Act (“ADA”), 42 U.S.C. §§ 12101 *et seq.* Plaintiff alleges violations to the Privacy Act, 5 U.S.C.A. § 552a and the Health Insurance Portability & Accountability Act of 1996 (HIPAA), 42 U.S.C. §§ 1320d, *et seq.* Plaintiff also invokes the supplemental jurisdiction of the court to adjudicate his claims under Puerto Rico state laws, to wit: Puerto Rico Law 100 of June 30, 1959 (“Law 100”), P.R. Laws Ann. tit. 29, §§ 146 *et seq.*; Puerto Rico Law 80 of May 30, 1976 (“Law 80”), P.R. Laws Ann. tit. 29, §§ 185a *et seq.*; and Articles 1802 and 1803 of the Civil Code of Puerto Rico (“Articles 1802 & 1803”), P.R. Laws Ann. tit. 31, §§ 5141, 5142.

Presently before the court is Defendant's motion to dismiss (Docket No. 55). Econo moved

<sup>1</sup> Plaintiff's wife's claims are derivative, therefore, the court will treat the matter as if Cintron-Garcia were the sole plaintiff.

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1 to dismiss under Federal Rule of Civil Procedure 12(b)(6) on grounds of failure to exhaust  
 2 administrative remedies. Plaintiff opposed the motion (Docket No. 56). After reviewing these and  
 3 other submissions and the pertinent law, the court **GRANTS** Defendant's motion to dismiss at  
 4 Docket No. 55.

5 **I. Legal Standard**

6 "The general rules of pleading require a short and plain statement of the claim showing that  
 7 the pleader is entitled to relief." Gargano v. Liberty Intern. Underwriters, Inc., 572 F.3d 45, 48 (1st  
 8 Cir. 2009) (citations omitted) (internal quotation marks omitted). "This short and plain statement  
 9 need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it  
 10 rests.'" Id. (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

11 Under Rule 12(b)(6), a defendant may move to dismiss an action against him for failure to  
 12 state a claim upon which relief can be granted. See FED. R. CIV. P. 12(b)(6). To survive a Rule  
 13 12(b)(6) motion, a complaint must contain sufficient factual matter "to state a claim to relief that is  
 14 plausible on its face." Twombly, 550 U.S. at 570. The court must decide whether the complaint  
 15 alleges enough facts to "raise a right to relief above the speculative level." Id. at 555. In so doing,  
 16 the court accepts as true all well-pleaded facts and draws all reasonable inferences in the plaintiff's  
 17 favor. Parker v. Hurley, 514 F.3d 87, 90 (1st Cir. 2008). However, "the tenet that a court must  
 18 accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."  
 19 Ashcroft v. Iqbal, --- U.S. ---, 129 S. Ct. 1937, 1949 (2009). "Threadbare recitals of the elements  
 20 of a cause of action, supported by mere conclusory statements, do not suffice." Id. (citing Twombly,  
 21 550 U.S. at 555). "[W]here the well-pleaded facts do not permit the court to infer more than the  
 22 mere possibility of misconduct, the complaint has alleged-but it has not 'show[n]' -'that the pleader  
 23 is entitled to relief.'" Iqbal, 129 S. Ct. at 1950 (quoting FED. R. CIV. P. 8(a)(2)).

24 **II. Factual and Procedural Background**

25 Plaintiff was employed by Econo as a produce assistant manager in Ponce, Puerto Rico in  
 26 February 2005. In June 2005, he began working as produce manager in Aibonito. On May 16, 2006,  
 27 Plaintiff was diagnosed with renal failure and was required to undergo dialysis on a regular basis.  
 28 After Plaintiff was diagnosed with this illness he took a medical leave. When he returned to work

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1 from the leave Plaintiff alleges he was subjected to discriminatory comments by his supervisors,  
2 regarding his health problems. He suffered a salary change, his duties changed, and he was  
3 transferred back to Ponce. Plaintiff alleges to have been discriminated against at the new location  
4 because of his condition.

5 Plaintiff filed a charge of discrimination with the Anti-Discrimination Unit of the  
6 Commonwealth of Puerto Rico Department of Labor (“ADU”) in Ponce, on May 2, 2007, checking  
7 ‘disability’ under cause of discrimination. (See Docket No. 55-1 at 2.) This charge was numbered  
8 70406cp. (See id.) Plaintiff was terminated from his job on July 16, 2007. (See Docket No. 55-2  
9 at 3.) On April 9, 2008, Plaintiff amended his charge of discrimination to include retaliation as a  
10 cause of discrimination. (See Docket No. 55-3.) On May 21, 2008, the Equal Employment  
11 Opportunity Commission (“EEOC”) issued Defendant a Notice of Charge of Discrimination under  
12 the Americans with Disabilities Act (“ADA”) with the following EEOC charge number 16H-2007-  
13 00772. (See Docket No. 55-2.) Almost a year later, on April 13, 2009, the EEOC issued a right to  
14 sue letter (“First Letter”) based on the following charges: Title VII, the ADA and/or the Age  
15 Discrimination in Employment Act (“ADEA”). (See Docket No. 55-4.) Plaintiff did not file a  
16 lawsuit within the ninety day statutory requirement. Defendant contends that Plaintiff is barred from  
17 claiming any remedy under Title VII since he failed to exhaust administrative remedies.

18 Plaintiff counter alleges that the complaint is not time barred since he filed it within ninety  
19 days of receiving a second right to sue letter (“Second Letter”) issued by the EEOC on July 16, 2010.  
20 (See Docket No. 55-7.) Defendant contends that because this Second Letter refers to the same  
21 charge as the First Letter, Plaintiff is barred to present a claim in federal court because he failed to  
22 file a claim within ninety days of the receipt of the First Letter. Plaintiff states that after receiving  
23 the April 13, 2009 right to sue letter, he received a letter dated March 15, 2010 from the ADU, titled  
24 “Amended . . .”. The letter informed that the ADU determined there was no probable cause for  
25 Plaintiff’s claim of disability discrimination in his employment. (See Docket No. 55-5.) The letter  
26 set forth a reconsideration procedure if Plaintiff disagreed. (See Docket No. 55-5.) There is a  
27 second letter from the ADU dated April 12, 2010. This letter refers to Plaintiff’s request of  
28 reconsideration of the ADU’s “no cause” ruling. The ADU referred the case to the Legal Affairs

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1 Bureau of the Department of Labor so it could be evaluated and recommendations could be made  
2 to the Secretary of Labor. (See Docket No. 55-6.) The next communication that Plaintiff received  
3 was the EEOC's Dismissal and Notice of Rights dated July 16, 2010 (the Second Letter) which had  
4 a different charge number (16H-2010-00303) than the First Letter. (See Docket No. 55-7.)

5 Plaintiff filed the instant complaint against Econo on October 21, 2010, within ninety days  
6 of the receipt of the Second Letter. (See Docket No. 1.) On, May 30, 2011, Econo filed a Rule  
7 12(b)(6) motion to dismiss Plaintiff's Title VII and ADA claims for failure to exhaust administrative  
8 remedies. (See Docket No.55.) Plaintiff responded with a motion in opposition. (Docket No. 56.)  
9 Defendant replied. (See Docket No. 59.) Since the second EEOC right to sue letter refers to a  
10 charge with a different number than the First Letter, the court ordered Plaintiff to submit for the  
11 record a copy of the EEOC charge of discrimination that corresponds to the charge number  
12 referenced in the Second Letter, and the causes of discrimination included in that charge. (See  
13 Docket No. 60.)

14 Plaintiff submitted a motion in compliance stating that there was no new charge of  
15 discrimination and that the EEOC charge of discrimination number 16H-2010-0030 refers to the  
16 original charge presented by Plaintiff on May 2, 2007. (See Docket No. 62.) Plaintiff explained that  
17 after presenting the original and the amended charge (including retaliation), at the ADU office in  
18 Ponce, he went to the EEOC office in San Juan and presented a copy of the aforementioned charges.  
19 Plaintiff claims that the EEOC office in San Juan started a separate investigation of the same charges  
20 and issued the First Letter without jurisdiction. (See Docket No. 62 at 2, § 4-6 and at. 3 § 10-11.)  
21 Plaintiff contends that "by statutes and regulations" only the EEOC Miami district office can issue  
22 valid right to sue letters for charges filed in front of the ADU and local EEOC offices. (See Docket  
23 No. 62 at 2-3, § 9.)

24 In response to Plaintiff's motion, Defendant accused Plaintiff of knowingly submitting false  
25 information to mislead it and the court into believing that he had filed a new 2010 charge in front  
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1 of the EEOC and/or the ADU.<sup>2</sup> (See Docket No. 67 at 4 § 8.) In light of this serious imputation, the  
 2 court ordered Plaintiff to reply to Defendant's motion. (See Docket 68.) Plaintiff filed a response  
 3 asserting that he had never alleged that the Second Letter was in response to a new charge filed by  
 4 him. (See Docket No. 71.) He alleges that there is in fact contradictory evidence from the EEOC  
 5 and the ADU that can not be construed as false information submitted by him. (See Docket No. 71  
 6 at 3 ¶ 6.) In his reply, Plaintiff requests an evidentiary hearing or an initial scheduling conference  
 7 in order to delve into the EEOC and ADU's internal proceedings to discover why the EEOC  
 8 produced two right to sue letters, and why the ADU sent Plaintiff a letter titled "Amended . . ."  
 9 almost a year after the EEOC had issued its First Letter. (See Docket No. 71 at 4 ¶ 7.) At Docket  
 10 68, the court ordered that Plaintiff's reply to Defendant's motion to comply would be the final  
 11 submission in this case. Defendant filed a motion to strike Plaintiff's reply. (See Docket No. 73.)  
 12 This motion was denied. (See Docket No. 77.)

13 **III. Discussion**

14 Defendant alleges that Plaintiff's complaint is time-barred since he did not file it within  
 15 ninety days of the receipt of the First Letter issued by the EEOC on April 13, 2009. Plaintiff  
 16 counters that the complaint is not time-barred since it was filed within ninety days of a Second Letter  
 17 issued by the EEOC on July 16, 2010.

18 The question before the court is whether a party is barred from filing a lawsuit in federal  
 19 court after receiving a second right-to-sue letter, if that party failed to file a lawsuit within the ninety  
 20 day period provided by a first right-to-sue letter.

21 **A. Motion to Dismiss v. Summary Judgment**

22 "Ordinarily, a court may not consider any documents that are outside of the complaint, or not  
 23 expressly incorporated therein, unless the motion is converted into one for summary judgment." Alt.  
 24 Energy, Inc. v. St. Paul Fire and Marine Ins. Co., 267 F.3d 30, 33 (1st Cir. 2001) (citing Watterson  
 25 v. Page, 987 F.2d 1, 3 (1st Cir. 1993)). However, there is "a narrow exception 'for documents the

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27 <sup>2</sup> Parties should refrain from making this type of serious accusations against each other without  
 28 providing the court with the necessary evidence to support it.

1 authenticity of which are not disputed by the parties; for official public records; for documents  
 2 central to the Plaintiff's claim; or for documents sufficiently referred to in the complaint.”” Alt.  
 3 Energy, Inc., 267 F.3d at 33 (quoting Watterson, 987 F.2d at 3). A plaintiff's administrative charge  
 4 filed with the EEOC or the ADU “may be considered either as a matter referenced in the complaint  
 5 or as a public record subject to judicial notice.” Maldonado-Cordero v. A T & T, 73 F. Supp. 2d  
 6 177, 185 (D.P.R. 1999) (citing Mack v. S. Bay Beer Distrib., Inc., 798 F.2d 1279, 1282 (9th Cir.  
 7 1986)). Therefore, the court will consider Plaintiff's administrative charge without converting the  
 8 motion to dismiss into a motion for summary judgment. See Barber v. Verizon New England, Inc.,  
 9 2005 WL 3479834 at \*1 n.1 (D.R.I. Dec. 20, 2005) (“While a court deciding a Rule 12(b)(6) motion  
 10 is normally constrained to consider only the plaintiff's complaint, a court may nonetheless take into  
 11 account a document whose contents are linked to the complaint . . . such as a charge of  
 12 discrimination filed with the [EEOC], without converting the motion into a summary judgment  
 13 request.”) (citing Beddall v. State St. Bank & Trust Co., 137 F.3d 12, 17 (1st Cir. 1998)).

#### 14           B.       Failure to Exhaust Administrative Remedies

15           Title VII and the ADA<sup>3</sup> require, as a predicate to a civil action, that the complainant first file  
 16 an administrative charge with the EEOC<sup>4</sup> within a specified and relatively short time period, usually  
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18           <sup>3</sup> In Bonilla v. Muebles J.J. Alvarez, Inc., 194 F.3d 275 (1st Cir. 1999), the First Circuit held  
 19 that claims under the ADA are identical to claims under Title VII in that the claimant first must  
 20 exhaust administrative remedies by filing a charge with the EEOC, or alternatively, with an  
 21 appropriate state or local agency, within the prescribed time limits. This omission bars the  
 22 courthouse door.

23           <sup>4</sup> “In ‘deferral states,’ or states with a certified Fair Employment Practice Agency (‘FEPA’),  
 24 this process begins when a claimant files a charge of discrimination with either the state FEPA,  
 25 in this case the ADU, or with the EEOC.” Perez Cordero v. Wal-Mart PR, Inc., 235 F. Supp.  
 26 2d 95, 100 (D.P.R. 2002) (citations omitted). In their Worksharing Agreement, “the EEOC  
 27 and the FEPA each designate the other as its agent for the purpose of receiving and drafting  
 28 charges, including those that are not jurisdictional with the agency that initially receives the  
 charges.” Lopez-Machin v. Indupro, 668 F. Supp. 2d 320, 325 (D.P.R. 2009). “[T]he  
 Worksharing Agreement also establishes that Title VII charges filed with the Commonwealth  
 are considered dual-filed, and ‘vice versa.’” Id. (citations omitted). Accordingly, the filing  
 of an administrative charge with the ADU is considered a filing with the EEOC.

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180 or 300 days,<sup>5</sup> after the discrimination complained of, and that the lawsuit be brought within an even shorter period of ninety days after notice that the administrative charge is dismissed or after the agency instead issues a right-to-sue letter. 42 U.S.C. § 2000e-5(f)(1). Clockedile v. New Hampshire Dept. of Corrections, 245 F.3d 1 (1st Cir. 2001) (citing Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393-95 n.12, (1982)). Despite occasional references to “jurisdiction,” this is basically an exhaustion requirement coupled with a short statute of limitations both on complaining to the agency and on filing the subsequent court case. Id. (citing Zipes, 455 U.S. at 393-95 n.12.) Thus, exhaustion has two key components: the timely filing of a charge with the EEOC and the receipt of a right-to-sue letter from the agency. See Jorge v. Rumsfeld, 404 F.3d 556, 564 (1st Cir 2005).

### 10 1. The Timely Filing of a Charge with the EEOC

11 Plaintiff complied with the first component of the exhaustion requirement. He timely filed  
 12 a charge of discrimination with the ADU and the EEOC checking ‘disability’ under cause of  
 13 discrimination. After Plaintiff was terminated from his job, he amended his charge of discrimination  
 14 to include retaliation as a cause of discrimination. (See Factual Background, Section II.) The  
 15 problem lies with the second component of the exhaustion requirement: the timely filing of a lawsuit  
 16 within the ninety day statutory period of the receipt of the right-to-sue letter. Even though Plaintiff  
 17 received a right-to-sue letter from the EEOC, he failed to file a complaint within the statutory ninety  
 18 day period that was clearly laid out in the first right-to sue-letter dated April 13, 2009.

### 19 2. The Receipt of a Right-to-Sue Letter from the Agency

20 Section 706(f)(1) of Title VII, dictates that upon receipt of notification from the EEOC of  
 21 either its dismissal of the charge of discrimination or its failure to negotiate a conciliation between

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 24 <sup>5</sup> “In Puerto Rico, an aggrieved employee has 300 days from the occurrence of the employment  
 25 action complained of to file an administrative charge in instances where the local Department  
 26 of Labor is empowered to provide relief, i.e., in instances of ‘deferral’ jurisdiction.” Rivera  
Abella, 470 F. Supp. 2d 86, 102 (D.P.R. 2007) (citing Bonilla v. Muebles J.J. Alvarez, Inc.,  
 27 194 F.3d 275, 278 n.4 (1st Cir. 1999); Lebron-Rios v. U.S. Marshal Service, 341 F.3d 7, 11  
 28 n.5 (1st Cir. 2003)). “Otherwise, the applicable period is 180 days.” Rivera Abella, 470 F.  
 Supp. 2d at 103 (citing 42 U.S.C. § 2000e-5(e)(1)).

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1 the parties, the party who filed the charge must file suit within ninety days or forfeit his right to bring  
 2 a private civil action. 42 U.S.C. §§ 2000e-5(f)(1). The ninety-day limitations period, however,  
 3 begins to run only upon receipt by the charging party of unambiguous notice that the EEOC has  
 4 terminated its administrative processing of the charge and has decided not to sue. See Gonzalez v.  
 5 Firestone Tire & Rubber Co. Et al., 610 F.2d 241, 245 (5th Cir. 1980).

6 An employee who fails to bring a complaint in federal court following receipt of a right-to-  
 7 sue letter within the time period allowed under Title VII is barred from ever bringing a federal claim  
 8 related to that EEOC charge even if a subsequent EEOC charge and right-to-sue letter reference the  
 9 earlier acts. See Spears v. Mo. Dep't of Corr. & Human Res., 210 F.3d 850, 853 n. 2 (8th Cir. 2000)  
 10 (refusing to consider an adverse employment action stemming from an earlier EEOC complaint  
 11 where complainant did not file suit within ninety days of the prior EEOC decision). In Brown v.  
 12 Mead, 646 F.2d 1163, 1164 (6th Cir. 1981), the Sixth Circuit held that “a plaintiff in a Title VII  
 13 action, who received two successive, facially valid right-to-sue notices from the [EEOC], but who  
 14 did not commence a suit in a district court within ninety days of receipt of the first notice, is  
 15 precluded from proceeding under the second notice.” The Sixth Circuit reached such conclusion  
 16 even though the first-issued right-to-sue letter later turned out to be in error and was followed by the  
 17 second letter with an admission by the EEOC to that effect. Under some circumstances, the EEOC  
 18 may issue a second right-to-sue notice upon completion of a discretionary reconsideration of a prior  
 19 determination provided it has given notice to both parties of its decision to reconsider within the  
 20 ninety-day period provided by the initial notice of right-to-sue. A party may challenge the validity  
 21 of that reconsideration and second notice only by showing that the sole purpose of reconsideration  
 22 was to extend the initial notice period.<sup>6</sup>

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 24 \_\_\_\_\_  
 25 <sup>6</sup> In the interests of accuracy and fairness, the EEOC should be able to reconsider a  
 26 determination whenever such reconsideration would not prejudice the parties before it or  
 27 violate the legislative purpose for which it was created. A contrary conclusion that an EEOC  
 28 notice once issued, no matter how flawed, could never be reconsidered could lead to  
Gonzalez v. Firestone Tire & Rubber Co. Et al., 610 F.2d 241, 246 (5th Cir. 1980)

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1 In the case at bar, there are two right-to-sue letters issued by the EEOC based on the same  
2 charge. Plaintiff admits that he did not file a new charge with the ADU or the EEOC. (See Docket  
3 No. 62 at ¶ 11.) The First Letter was issued on April 13, 2009 and Plaintiff did not file a complaint  
4 within ninety days. The Second Letter was issued more than a year later, on July 16, 2010, and was  
5 not issued as a result of a process of reconsideration of its first determination. (See Docket Nos. 55-  
6 4 and 55-7.) Since Plaintiff did not act upon the First Letter, he is precluded from filing suit based  
7 on the Second Letter. Plaintiff needed to act upon the First Letter issued by the EEOC on April 13,  
8 2009 within ninety days to confer jurisdiction upon this court.

9 Plaintiff also argues that the Second Letter refers to the original charge that he filed in May  
10 2007, and the fact that it has a different charge number is a clerical error on the part of the EEOC San  
11 Juan office. (See Docket 62 §11 at 3.) Plaintiff has requested an evidentiary hearing or an initial  
12 scheduling conference in order to delve into the EEOC and ADU's internal proceedings and discover  
13 why the EEOC produced two right to sue letters when there was only one charge filed. (See Docket  
14 No. 71 at 4 ¶¶ 6-7) and why the ADU sent Plaintiff a letter titled "Amended", eleven (11) months  
15 after the EEOC had issued its First Letter. (See Docket Nos. 55-5 and 55-6). However, the court  
16 cannot make a factual inquiry into agency procedures to ascertain the validity of notices of right to  
17 sue on a case by case basis. Neither party to a Title VII employment discrimination suit can raise  
18 administrative inconsistency or error to compel looking beyond a notice of right to sue to ascertain  
19 if the EEOC was acting in compliance with its regulations and procedures. See Brown, 646 F.2d at  
20 1167 n.7.

21 As it follows from the cited caselaw, in the instant case the court will not grant Plaintiff's  
22 request for an evidentiary hearing or an initial scheduling conference since the purpose of that  
23 request is to clarify the alleged inconsistencies underlying both right to sue letters. It is clearly  
24 established that, even if the Second Letter refers to the original charge, failure to file the complaint  
25 before the court within ninety days of receiving the first right-to-sue letter precludes the  
26 corresponding civil action. Therefore, the court **GRANTS** Defendant's motion to dismiss Plaintiff's  
27 Title VII and ADA claims for failure to exhaust administrative remedies.

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1                   **3.       Equitable Tolling**

2                   Title VII's exhaustion requirement is subject to equitable exceptions. See Bonilla v. Muebles  
 3                   J.J. Alvarez, Inc., 194 F.3d 275, 278 (1st Cir. 1999). However, the First Circuit has warned that "the  
 4                   federal standard reserves equitable tolling for exceptional cases." Id. at 279. "[E]quitable tolling is  
 5                   not appropriate unless a claimant misses a filing deadline because of circumstances effectively  
 6                   beyond her control (such as when her employer actively misleads her, and she relies on that  
 7                   misconduct to her detriment)." Id., at 279. Cases in which the equitable tolling doctrine is invoked  
 8                   are most often characterized by some affirmative misconduct by the party against whom it is  
 9                   employed, such as an employer or an administrative agency.

10                  Courts generally weigh five factors in assessing claims for equitable tolling: (1) lack of actual  
 11                  notice of the filing requirement; (2) lack of constructive knowledge of the filing requirement; (3)  
 12                  diligence in pursuing one's rights; (4) absence of prejudice to the defendant; and (5) a plaintiff's  
 13                  reasonableness in remaining ignorant of the notice requirement." Kelley v. N.L.R.B., 79 F.3d 1238,  
 14                  1248 (1st Cir. 1996). Neves v. Holder, 613 F.3d 30, 36 n. 5 (1st Cir. 2010)

15                  The instant case is not an exceptional case where equitable tolling applies. Plaintiff claims  
 16                  that the First Letter issued by the San Juan EEOC area office was not valid because the San Juan  
 17                  office emitted it without jurisdiction. In addition, Plaintiff alleges that the first right-to-sue letter  
 18                  referred to the ADU complaint filed by the Plaintiff and not to the charge he filed in front of the  
 19                  EEOC. Plaintiff claims that only the EEOC Miami district office has jurisdiction to issue a right-to-  
 20                  sue letter that refers to the charge filed in front of the EEOC. These arguments are without merit.  
 21                  First, both the San Juan local office and the Miami district office of the EEOC have jurisdiction over  
 22                  Puerto Rico and have the authority to issue right to sue letters. Second, Plaintiff fails to recognize  
 23                  that according to the worksharing agreement between the ADU and the EEOC, a charge filed with  
 24                  the ADU is also considered filed with the EEOC. Title VII charges filed with the Commonwealth  
 25                  are considered dual-filed, and vice versa. Lopez-Machin v. Indupro, 668 F. Supp. 2d 320, 325  
 26                  (D.P.R. 2009) (citations omitted).

27                  Since Plaintiff fails to allege any affirmative misconduct on the part of the ADU that  
 28                  prevented him from effectively filing the instant lawsuit within the statutory ninety day period

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1 established by the first right-to-sue letter, equitable tolling does not apply. As a result, the court  
 2 **GRANTS** Defendant's motion to dismiss Plaintiff's Title VII and ADA claims for failure to exhaust  
 3 administrative remedies.

4 **C. Claims under HIPAA and Privacy Act**

5 Plaintiff alleges that confidential details regarding his medical condition, medical documents  
 6 and information were purposely or negligently revealed by Defendant to Plaintiff's co-workers  
 7 without his consent in violation of the Privacy Act and HIPAA.<sup>7</sup> (See Docket No. 30 at ¶ 28.)

8 In Valentin Munoz v. Island Finanace Corp., 364 F. Supp. 2d 131 (D.P.R. 2005), the court  
 9 established that HIPAA does not provide for a private cause of action. Thus, Plaintiff claims for  
 10 damages under HIPAA are without merit. With regards to the Privacy Act, said act authorizes a suit  
 11 against certain agencies. See Parks v. Internal Revenue Serv., 618 F.2d 677 (10th Cir. 1980). Under  
 12 the Privacy Act, an agency is defined as any executive department, military department, government  
 13 corporation, government controlled corporation, or other establishment in the executive branch of  
 14 the government (including the Executive Office of the President), or any independent regulatory  
 15 agency. 5 U.S.C. § 552 (6)(f)(1). Econo does not fall into the definition of agency under the Privacy  
 16 Act. Therefore, Plaintiff does not have a cause of action under that law.

17 Accordingly, the court **GRANTS** Defendant's motion to dismiss Plaintiff's allegations under  
 18 HIPAA and the Privacy Act for failure to state a claim for relief.

19 **D. Claims under Puerto Rico Laws**

20 Plaintiff invokes the supplemental jurisdiction of the court to adjudicate his claims under  
 21 Puerto Rico Laws 100 and 80, as well as Articles 1802 and 1803. With the dismissal of federal  
 22 claims against Defendant, there are no pending claims giving rise to federal jurisdiction. 12 U.S.C.  
 23 § 1819(b)(2)(A). As such, dismissal of pending state law claims is proper because an independent  
 24 jurisdictional basis is lacking. Exercising jurisdiction over pendent state law claims once the federal

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 27 <sup>7</sup> The law specifically indicates that only the Secretary of Health and Human Services or other  
 28 authorized state authorities may bring forth a HIPAA enforcement action. See 42 U.S.C. § 300gg-22.

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1 law claims are no longer present in the lawsuit is discretionary. See Newman v. Burgin, 930 F.2d  
2 955, 963 (1st Cir .1991) (holding that “[t]he power of a federal court to hear and to determine state-  
3 law claims in nondiversity cases depends upon the presence of at least one ‘substantial’ federal claim  
4 in the lawsuit . . . [and] the district court has considerable authority whether or not to exercise this  
5 power, in light of such considerations as judicial economy, convenience, fairness to litigants, and  
6 comity[ ]”).

7 In the instant case, the court chooses not to hear the state law claims brought by Plaintiff  
8 against Defendant. As such, the court will enter judgment **DISMISSING WITHOUT**  
9 **PREJUDICE** Plaintiff’s state law claims against Econo.

10 **IV. Conclusion**

11 For the reasons set forth above, the court **GRANTS** Defendant’s motion to dismiss at Docket  
12 No. 55. Plaintiff’s federal claims are **DISMISSED WITH PREJUDICE**. Plaintiff’s state law  
13 claims are **DISMISSED WITHOUT PREJUDICE**. Plaintiff’s request for an evidentiary hearing  
14 and for an initial scheduling conference at Docket No. 72 is hereby **DENIED**.

15 **SO ORDERED.**

16 In San Juan, Puerto Rico this 17th day of October, 2011.

17 *S/Gustavo A. Gelpí*  
18 GUSTAVO A. GELPÍ  
19 United States District Judge  
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